nor of a mechanic's lien,[8] is obliged to resort to his security before suing on the personal obligation, and there is no reason why one entitled to the security of a trust deed, which, under the decisions, has been most clearly differentiated from a mortgage,[9] should be classed with the statutory mortgagee in this respect. O. K. M.

Vendor and Vendee—Right of Vendee to Rescind Where Vendor has no Title.—Prentice v. Erskine [1] was an action to quiet title to certain land against a contract of sale, in which the defendant interposed the defense that the contract under which he claimed had been rescinded, and asked judgment for the amount paid on the purchase price. The ground on which the vendee based his right to treat this contract as rescinded, was that at the time of entering into the contract, the land, unknown to him, was subject to a public highway. The court held that "the vendee might have rescinded the contract at any time even though the time for final payment had not arrived because the vendor, in the nature of things, never could offer a perfect title." The court, while recognizing the rule established in earlier cases,—one of them decided within less than a month of the Prentice case [2]—that a vendee cannot complain because a vendor has no title before the time for performance arrives, says it is "a harsh rule and should not be extended."

The foundation of the California rule upon this subject is that no breach of the contract can occur until the time arrives for making the conveyance. The vendee, therefore, has the burden of paying installments of the purchase price to a vendor who has never had title to the land or has conveyed all of his interest to a third person.[3] There would seem to be no difference in principle between the situation where the land is conveyed to a third person without notice of the rights of the vendee, and where it is conveyed to the public. In either

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[8] Bates v. Santa Barbara Co. (1891), 90 Cal. 543, 27 Pac. 438.

[9] Weber v. McCleverty (1906), 149 Cal. 316, 86 Pac. 706, a creditor holding a debt secured by trust deed of a homestead need not present his claim to the estate though the mortgagee in like situation must do so.

[1] Prentice v. Erskine (Jan. 6, 1913), 44 Cal. Dec. 50.

[2] Winkler v. Jerrue (Dec. 9, 1912), 15 Cal. App. Dec. 784; Garberino v. Roberts (1895), 109 Cal. 125, 41 Pac. 857; Shively v. Semi-Tropic Land and Water Co. (1893), 99 Cal. 259, 33 Pac. 848; Joyce v Schafer (1893), 97 Cal. 335, 32 Pac. 320; Hanson v. Fox (1909), 155 Cal. 106, 132 Am. St. Rep. 72, 99 Pac. 490, 20 L. R. A. (N. S.) 338; Backman v. Park (1910), 157 Cal. 607, 108 Pac. 687, 137 Am. St. Rep. 153; but see: Burks v. Davies (1890), 85 Cal. 110, 24 Pac. 613; Sanders v. Lansing (1886), 70 Cal. 429, 11 Pac. 702; Marshall v. Caldwell et al. (1871), 41 Cal. 611; Easton v. Montgomery (1891), 90 Cal. 307, 27 Pac. 280; Birch v. Cooper (1902), 136 Cal. 636, 69 Pac. 420; Leach v. Rowley (1903), 138 Cal. 709, 72 Pac. 403; Alderson v. Houston (1908), 154 Cal. 1, 96 Pac. 884.

[3] Hanson v. Fox, supra; Garberino v. Roberts, supra; Joyce v. Shafer, supra.

case there is the possibility that the vendor may be able to convey a clear title when the time for performance arrives.

The California rule is almost universally repudiated in other jurisdictions.[4] The general rule is that if the vendor, at the time of making the contract, has no interest in the land, or subsequently, (but before the time for conveyance to the vendee), conveys an interest in the land to a third person who has no notice of the vendee's rights, the latter may treat the contract as rescinded. The reasoning on which this right is based is variously stated by the different courts. It is held that the vendor may be regarded as a trustee of the legal title for the vendee and that such a conveyance is a breach of trust.[5] Again the conveyance by the vendor may be interpreted as a repudiation[6] of the contract of offer of its recission.[7] In Massachusetts,[8] it is held that in contracts for the sale of land there is an implied condition to keep the land in a condition to be conveyed, and that a breach of this condition gives the vendee the right to treat the contract as rescinded.

The important question should be not whether the vendor actually has title to the land, or whether, before the time for performance arrives, the land is free from incumbrances, but whether or not the title to the land is held by a third person free from the vendee's right to specific performance when the time for conveyance arrives. Thus, it is generally held that no right to treat the contract as rescinded exists where the vendor has such an interest in the land that he is legally entitled to call in the title,[9] or where a vendor having title, makes a conveyance to a third person with notice of[10] or subject to the vendee's rights,[11] or even where the third person offers to convey[12] or

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[4] Ft. Payne Coal & Iron Co. v. Webster (1895), 163 Mass. 134, 39 N. E. 786; (but see Dresel v. Jordan (1870), 104 Mass. 407); Meyers v. Markham (1903), 90 Minn. 230, 96 N. W. 787; James v. Burchell (1880), 82 N. Y. 108; Brodhead v. Reinbold et al. (1901), 200 Pa. 618, 50 Atl. 229; Dantzeiser v. Cook (1872), 40 Ind. 65; Atchinson v. Scott (1877), 36 Mich. 18; Weaver v. Atchinson (1887), 65 Mich. 285, 32 N. W. 436; Reynolds et al. v. Manhattan Trust Co. et al. (1897), 83 Fed. 593; Smiley v. Barker (1897), 83 Fed. 684; Aukney v. Clark (1893), 148 U. S. 345; Gray v. Smith (1897), 83 Fed. 824; Foxley v. Rich (1909), 35 Utah 171, 99 Pac. 66, distinguishing Donovan v. Hanoner (1905), 32 Utah 326, 90 Pac. 569; Bellamy v. Debenham (1891), 1 Ch. 413; Weston v. Savage (1879), 10 Ch. D. 736; Forrer v. Nash (1865), 35 Beav. 167; Hoggart v. Scott (1830), 1 Russ & M. 293.

[5] Burks v. Davies, supra.

[6] Smiley v. Barker (1897), 83 Fed. 684.

[7] Dantzeiser v. Cook, supra.

[8] Ft. Payne Coal & Iron Co. v. Webster, supra.

[9] Easton v. Montgomery, supra; Townsend v. Goodfellow (1899), 40 Minn. 312, 41 N. W. 1056; Diggle v. Baulden (1880), 48 Wis. 477, 4 N. W. 678.

[10] Hoock v. Bowman (1894), 42 Neb. 87, 60 N. W. 391.

[11] Kreibich v. Martz (1899), 119 Mich. 343, 78 N. W. 124; Fields v. Clayton (1897), 117 Ala. 538, 67 Am. St. Rep. 189, 23 So. 530.

[12] Bateman v. Johnson (1859), 10 Wis. 1; Royal v. Dennison (1895), 109 Cal. 558, 99 Pac. 489.

release [13] the land to the vendee. In all such cases, the vendee suffers nothing from the act of the vendor. But in these cases, specific performance is possible against the third person. The characterization of the California rule by Mr. Justice Melvin as "a harsh one" and one "not to be extended," marks, let us hope, the introduction of proper limitations upon the doctrine. The result in the Prentice case is certainly one to be commended. M. B. K.

Vendor and Vendee—Waiver of Forfeiture by Vendor.—The case of Stevison v. Joy [1] was an action by the holder of the legal title, against the vendee under an excutory contract of sale, to quiet the title to certain land. The contract provided that the purchase price was to be paid in installments, that the time of payment was of the essence of the contract, and that on the failure to pay any installment when due the vendor might declare those paid forfeited and refuse to convey the land. The vendee admitted that he was in default in tendering an installment when due but claims that the vendor had waived his right to declare a forfeiture for delay in making these payments, since it had been his custom to receive overdue payments, and he had thereby induced the defendant to believe that no forfeiture would be declared because of such delay. The plaintiff admits that this is a good defense as to those installments which have been received, but contends that it would be an alteration of a written contract by a parol agreement [2] to deny him the right to declare a forfeiture for failure to pay future installments on time.

The court held that "Where time is made of the essence of the contract for the payment of rent or other payments of money, and this covenant has been waived by the acceptance of rent or other moneys after they are due, and with the knowledge of the facts, such conduct will be regarded as creating such a temporary suspension of the right of forfeiture as could only be restored by giving a specific notice of an intention to enforce it." This decision is clearly in accord with the great weight of authority [3] and with the Civil Code of California, which

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[13] Galvin v. Collins (1880), 128 Mass. 525.

[1] Stevison v. Joy (1912), 44 Cal. Dec. 643.

[2] Stevison v. Joy, supra; California Civil Code, Sec. 1698; Thompson v. Gorner (1894), 104 Cal. 168, 37 Pac. 900.

[3] Cal. Civil Code, Sec. 1511, Subd. 3; Monson v. Bragdon (1895), 159 Ill. 66, 42 N. E. 383; Standard Brewing Co. v. Anderson (1908), 121 La. 935, 46 So. 926; Gunther v. New Orleans Cotton Exchange Mutual Aid Assn. (1888), 40 La. Ann. 776, 5 South. 65, 2 L. R. A. 118 (cases cited in note), 8 Am. St. Rep. 554; Barnett et al. v. Sussman (1907), 102 N. Y. Sup. 287; Robinson v. Trufant (1893), 97 Mich. 410, 56 N. W. 769; Harris v. Troup et al. (1840), 8 Paige (N. Y.) 423; Maffet v. Oregon & C. R. Co. (1905), 46 Ore. 443, 80 Pac. 489; Whiting v. Doughton (1903), 31 Wash. 327. 71 Pac. 1026; but see Lent v. B. & M. R. R. Co. (1881), 11 Neb. 186, 7 N. W. 737.